No. 17-269

In the Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE NAVAJO NATION, THE UTE MOUNTAIN UTE TRIBE, AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES IN SUPPORT OF RESPONDENT

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INTERESTS OF THE *AMICI CURIAE*[1]

Founded in 1944, the National Congress of American Indians ("NCAI") is the nation's oldest and largest association of Native American and Alaska Native tribal governments, representing hundreds of federally recognized Indian tribes and many individuals. NCAI serves as a forum for consensus-based policy development among its member tribes from every region of the country. Its mission is to inform and educate the public, the federal government, and state governments about treaty rights, tribal self-government, and a broad range of public policy issues affecting Native nations, tribes and pueblos.

The Navajo Nation (the "Nation") is the largest Indian nation in the United States by land holdings. Spanning 17 million acres in Arizona, New Mexico and Utah, the Nation is larger than 10 states and roughly the size of West Virginia, and is home to more than 300,000 enrolled members. As a sovereign government, the Nation entered into two ratified treaties with the United States, in 1850 and 1868, respectively.

The Ute Mountain Ute Tribe ("UMUT") is a federally recognized Indian tribe whose reservation encompasses lands in Colorado, New Mexico and Utah, totaling approximately 600,000 acres – nearly the size of Rhode Island. UMUT is a successor to the 1868 Treaty with the Tabeguache, Muache, Capote,

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. All parties have consented to the filing of this brief.

Weenuche (also Weeminuche), Yampa, Grand River and Uintah bands of Ute Indians, 15 Stat. 619.

The Confederated Salish and Kootenai Tribes ("CSKT") are a federally recognized tribe governed pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984 (25 U.S.C. § 461, et seq. (transferred to 25 U.S.C. §5101 et seq.)) with a 10-member council operating under a Constitution and By-Laws adopted in accordance with § 16 of that Act. On July 16, 1855, the Salish and Kootenai nations and the United States entered into the Hellgate Treaty, 12 Stat. 975, wherein the CSKT reserved to themselves a permanent homeland of approximately 1.3 million acres on what is now the Flathead Indian Reservation, located in northwest Montana.

Respondent Tribes in this case have been confronted with an aggressive invocation of equitable principles aimed at extinguishing their fundamental rights – here the notion that mid-level federal bureaucrats with no responsibility for treaty rights could be deemed to have waived those rights through actions involving no consideration of them. So too are tribes across the country having to deal with increasingly bold and far-ranging assertions that virtually any form of tribal right can be defeated by broad reference to equity, in a way that is entirely inconsistent with fundamental principles of federal Indian law.

Amici respectfully offer this brief because treaties reflect solemn commitments between sovereigns. They are entered into based upon mutual respect and the shared understanding that each party has a right to self-governance and self-determination, and

are negotiated to serve the best interests of their people and the public policies of each sovereign.

SUMMARY OF THE ARGUMENT

Much of this litigation has understandably focused on the proper interpretation of the Treaty of Medicine Creek, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1133 and other treaties at issue in this case ("Stevens Treaties"). What sets this case apart, however, is the State's assertion that the usual protections provided to the United States as a litigant do not apply when the United States acts as a trustee for Indian tribes. The State of Washington (the "State") cites no authority for departing from the Court's longstanding principle that the doctrines of waiver, estoppel and laches presumptively do not apply to the United States when it is enforcing federal law. That principle should be applied with *greater*, not lesser, strength when the United States is enforcing treaties solemnly entered with tribal governments.

Unlike many other areas of federal law, where the executive is vested with substantial discretion in applying and enforcing the law in the public interest, this Court recognizes a treaty as a contractual obligation that the United States may not abrogate without a clear expression of intent from Congress. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-322 (1943).

From the earliest days of this republic, Indian tribes have relied on the United States, acting as their trustee, to assert and protect their treaty and other statutory rights against encroachment by state

governments. *See, e.g., United States v. Kagama*, 118 U.S. 375, 384 (1886) (upholding Congress' assertion of federal criminal jurisdiction under the Major Crimes Act, 48th Cong., 2d Sess., 16 Cong. Rec. 934 (1885)). Tribal-state relations have improved immeasurably since *Kagama* and other early decisions of this Court. Yet Indian tribes are still barred by sovereign immunity from asserting their claims for treaty violations directly against a state without the assistance of the United States government. *See* Opening Brief at 45 ("Had the State prevailed as to those defenses, the case would have ended, because the Tribes would have been unable to overcome the State's sovereign immunity without the United States."). Although tribes must often rely on the initiative of the United States to enforce treaty rights, the equitable defenses – including waiver, estoppel and laches – typically are unavailable when states are litigating against the United States. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63 (1984).

The State would upset this balance. Citing *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), the State proposes an exception: When the United States acts as trustee for Indian tribes, then states can broadly invoke a full suite of equitable defenses against the United States government. Opening Brief at 44-45. Such a sweeping exception is not supported by *City of Sherrill*.

More specifically, the State takes the position that the federal government may waive treaty rights, or be estopped from asserting them, simply by promulgating nationwide federal regulations and guidance on road construction without reference to local

or regional treaty obligations. This Court rejected that position in *Cramer v. United States*, 261 U.S. 219, 234 (1923), where federal agents who issued a lease of Indian land without authority could not waive the right of the United States to bring an action subsequently to protect the Indians' rights. There is similarly no claim that Respondents waived or failed to assert their treaty rights in this case. *See* Opening Brief 45-52 ("The State Should Be Allowed to Raise Equitable Defenses Against the *Federal Government*")(emphasis added).

Taking the State's argument to its logical conclusion, if the advent of federal statutory or regulatory activity on a national scale constituted equitable waiver in and of itself, the United States might never be able to assert a treaty violation on behalf of an Indian tribe. The State does not explain how this squares with Congressional power over Indian affairs. That is to say, the power to abrogate (or "waive") Indian treaties is vested exclusively with Congress and then only in express and unequivocal terms. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202. Assuming *City of Sherrill* even applies here, neither it nor this Court's subsequent cases question, let alone challenge, Congressional primacy in matters regarding Indian tribes, such as determining the proper balance to strike when state actions adversely affect tribes' treaty rights.

Asserting a laches defense against the United States likewise draws no support from *City of Sherrill*. Judge O'Scannlain's suggestion that this case may be barred by laches, Pet. App. 33a (O'Scannlain, J., statement regarding denial of rehearing *en banc*), is a bridge too far. The defense of laches was never

raised below, and it is not supported by any findings of fact in the record. References to "nineteenth century" treaties notwithstanding, Pet. App. 18a (O'Scannlain, J., statement regarding rehearing *en banc*), no litigant has set forth the actual elements of laches and related them to the findings of fact in the record – many of which deal with current events, *see, e.g.*, Pet. App. 141a, ¶¶ 3.55-3.64; Pet. App. 145a, ¶ 3.79; Pet. App. 157a-58a, ¶¶ 7-8; Pet. App. 162a-64a, ¶¶ 28-29.

To apply laches to this situation would be to adopt a rule without applying even normal standards of pleading and proof, much less the heightened standard normally applied when invoking laches against the United States. There is nothing in *City of Sherrill*, or any ordinary principle of law, that would support such a conclusion.

ARGUMENT

In *City of Sherrill* this Court held that equitable doctrines barred a tribe's assertion of sovereign authority over land purchased on the open market and subject to state and local authority for two centuries. 544 U.S. 197.[2] The State would bootstrap *City of Sherrill* – a case in which the United States was not a party – to prevent the federal government from litigating on behalf of tribal treaty claims. This would allow states to assert equitable defenses against the federal government, and abrogate the time-honored rule that waiver will not be applied

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[2] *City of Sherrill* applied laches, acquiescence and impossibility. By contrast, the equitable doctrines raised by the State in this case are waiver and estoppel.

against the United States on the basis of ordinary governmental activity by federal officials, *see Heckler*, 467 U.S. at 63. Even assuming *City of Sherrill* applies, reading it as the State insists here would compromise the United States' statutory obligations as trustee under the Stevens Treaties while casting doubt on many others.

I. WHEN THE UNITED STATES ACTS AS TRUSTEE FOR INDIAN TRIBES, IT ENJOYS ALL THE ORDINARY PROTECTIONS OF THE GOVERNMENT ACTING IN THE PUBLIC INTEREST, AND *CITY OF SHERRILL* DID NOT CHANGE THIS.

A. Tribes must rely on the United States, as trustee, to protect their rights.

Historically the United States, acting as trustee for Indian tribes, was primarily responsible for bringing a legal action when tribal rights were infringed. *Cayuga Indian Nation of New York, by Patterson v. Cuomo*, 565 F. Supp. 1297, 1326 (N.D.N.Y. 1983)("[D]uring the nation's early history lawsuits by tribes were rare.")(citing Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 46 (1978)); *Oneida Indian Nation of New York v. State of N.Y.*, 691 F.2d 1070, 1081–82 (2d Cir. 1982)("Pursuant to its obligations as trustee to Indian tribes to bring suits on their behalf, the Executive Branch through the Interior and Justice Departments has been active in processing and

litigating the thousands of claims submitted by Indian tribes.").

The federal role as trustee for Indian tribes was intended to provide a crucial protection against state governments whose interests frequently conflicted with those of tribes. "In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party[;] ... it has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

Despite tribal capacity-building in recent years, along with greatly improved state-tribal relations, this case demonstrates the continuing importance of the federal government's trusteeship obligations. Part of this stems from the Constitutional architecture: Tribes may not sue state governments directly under the Eleventh Amendment without states' consent. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268–69 (1997). Accordingly, tribal governments must often rely on the United States to bring suit to protect their rights against state encroachment. *See, e.g., U.S. on Behalf of Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552, 1560 (8th Cir. 1997); *U.S. ex rel. Cheyenne River Sioux v. S. Dakota*, 102 F. Supp. 2d 1166, 1171–72 (D.S.D. 2000)(contesting the application of state taxes).[3]

The State suggests that whenever the federal government "partners" with a state, or regulates or

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[3] Prospective injunctive under *ex parte Young* was not available in those cases because the relief sought included reimbursement of taxes paid. *See Cheyenne River*, 105 F.3d at 1170.

provides guidance for certain aspects of highway construction, the United States should be estopped from bringing any subsequent actions on behalf of an Indian tribe, even when the federal officials involved acted without knowledge or regard for tribal rights as explicitly protected by treaties and other statutes. Opening Brief at 46; Brief of Idaho, *et al*, at 24.[4] This approach would have the practical effect of exempting from federal enforcement any tribal right that relates to federal regulation or policy. Because it is not clear how much federal involvement is necessary to create a "partnership" according to the State's approach, adopting it here could open the door more broadly as a defense against the United States' ability to litigate not only on behalf of tribal interests, but conceivably in many other areas, unrelated to federal Indian law, where a party might wish to raise waiver against the United States.

From a tribal perspective, carving out a categorical exception to the time-tested principles of equity whenever the United States acts as trustee for tribes and their members, presents practical difficulties and very real hardship. Tribes already must compete with a vast array of non-Indian interests when it comes to accessing the federal government's litiga-

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[4] Idaho, *et al*, characterizes this relationship as a "partnership." Brief of Idaho, et al. at 24. The argument that the United States' role in encouragement and design of state highways was so pervasive that it should be held responsible for their consequences, taken to logical conclusion, suggests that the United States is also responsible for routine torts and other causes of action arising from the existence and design of these highways. A permittee is clearly in a much different position than a "partner."

tion resources. And tribal interests will always be just one component of the broader public interest standard that Congress and the executive branch must consider in formulating, implementing and enforcing national public policy. Adding an ambiguous equitable defense to the equation would further degrade the federal government's ability to protect tribal rights.

The State characterizes the activities of the federal government as "encouraging Washington's highway construction, directing the State's culvert design, and issuing permits for the culverts." Opening Brief at 51. There is no allegation that the issue of treaty rights was ever raised or addressed during this permitting process, and therefore the district court made no findings of fact that would support such a claim.

Yet the State and its supporters still take the position that by merely encouraging highway construction, the United States waives its right to object whenever a state builds a highway in violation of a treaty or other applicable federal laws. "[The Washington State Department of Transportation] adhered to hydraulic culvert designs published by the FHWA as a condition of federal funding until Washington itself developed design methods that improved upon the federal model." Brief of Idaho, *et al*, at 23. "Washington has also received [Clean Water Act] permits under 33 C.F.R. § 323 with respect to its culvert construction activities." *Id.* at 23-24.

Essentially, federal officials issued permits pursuant to two federal statutes and their accompanying regulations. This permitting process is no guarantee, or even an indicator, of compliance with any

other applicable federal laws. For instance, a permit under the Clean Water Act, 33 U.S.C. §1251 et seq. (1972)), does not demonstrate that the State complied with other federal laws or regulations, which could range from labor-contracting provisions and union requirements to workplace safety or many other matters within the United States' jurisdiction. Just as a Clean Water Act permit would not bar suit for entirely unrelated violations of federal law, it should not bar suit for treaty violations.

A continuing reality of federal Indian law, particularly given Congressional primacy in Indian affairs, is that the federal government, while acting as trustee for a tribe, sometimes encounters actual or perceived conflicts of interest or policy that would be impermissible in other trust or representative relationships. The United States, for example, has been permitted to bind a tribe to a water rights settlement – without the tribe's participation – when one of the other primary water claimants was the United States Bureau of Reclamation. *Nevada v. United States*, 463 U.S. 110, 134-35 (1983). But "the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests." *Nevada*, 463 U.S. at 142.

As this Court recently observed, "the Government has often structured the trust relationship to pursue its own policy goals." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011). This reflects the Court's longstanding deference to Congress and the executive branch. Even though such conflicts are permitted when the federal government acts formally as a trustee and a litigant, that is no

reason to assume the United States is acting as trustee, and waiving a known legal right on behalf of a tribe, whenever it performs its unrelated role in encouraging state highway construction.

The federal government routinely regulates, in the public interest, matters that are relevant to potential disputes between tribal and state governments, including roads and culverts, water quality (the Clean Water Act, 33 U.S.C. §1251 et seq. (1972)), pipelines (the Natural Gas Act, 15 U.S. Code § 717f). If compliance with distinct federal laws and regulations becomes a defense to litigation brought by the United States, the ability of the United States to safeguard tribal treaty rights would wither, along with other important statutory protections.

In practice, the State's proposed legal rule would make compliance with one or more unrelated federal laws a valid or at least plausible defense to allegations of treaty violations by state governments. This would be a sudden and dramatic reversal of the longstanding principle articulated by this Court that treaties, to which by definition states are not parties, must be construed liberally. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-322 (1943)(quotation omitted). "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians," *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), and "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980). "When ...

faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992), quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759,766 (1985). "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress," *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (quotation omitted).

B. Equitable defenses, such as waiver and estoppel, do not generally apply against the United States, and nothing in this Court's decision in *City of Sherrill* suggests otherwise.

When the United States brings suit, it acts not merely as a private litigant, but as a representative of the public interest. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917). As such, it is not generally subject to equitable defenses such as waiver. *Id.* ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.") "The general principles of equity are applicable in a suit by the United States . . . [b]ut they will not be applied to frustrate the purpose of its laws or to thwart public policy." *Pan–Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456, 506 (1927).

Defendants may not assert estoppel or waiver on the basis of statements by federal employees. *Heckler*, 467 U.S. at 63. "This is consistent with the

general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Id.* Or as Justice Holmes observed, "[m]en must turn square corners when they deal with the Government." *Id.* (quoting *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920)). In bringing suit on behalf of a tribe, the United States both acts as a trustee and "assert[s] its own sovereign interest." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011). It is acting in the public interest, not as a private litigant.

For example, in *Cramer* this Court found that the United States was not "estopped from maintaining [a] suit [on behalf of individual Indian landowners] by reason of any act or declaration of its officers or agents" because "these Indians with the implied consent of the government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to deal with the land upon any other theory." *Cramer*, 261 U.S. at 234.

Adhering to *Cramer*, the Ninth Circuit has traditionally held that equitable defenses are not available in cases involving Indian treaty rights. Decision Below, Pet. App. 97a-98a, quoting *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) and *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956). Although acknowledging that this line of cases has been limited by *City of Sherrill*, the court found it has not been overruled. *Id.* at 98a.

States usually apply the very same principle in their own courts in cases involving state governmen-

tal activity. *See, e.g., Matter of Hamptons Hosp. & Med. Ctr. v. Moore*, 417 N.E.2d 533 (N.Y. 1981) ("The doctrine of estoppel is not applicable to the State acting in a governmental capacity."). The State of Washington is no exception. *State v. O'Connell*, 523 P.2d 872, 891, supplemented, 528 P.2d 988 (Wash. 1974) ("It is the general rule that the courts will not apply principles of equitable estoppel against the government or government subdivisions under certain situations.")

This Court has never laid out circumstances under which equitable defenses may be raised against the United States. *Heckler*, 467 U.S. at 66 ("Thus, assuming estoppel can ever be appropriately applied against the Government . . ."); *id.* at 68 (Rehnquist, J., concurring) ("I agree with the Court that there is no need to decide in this case whether there are circumstances under which the Government may be estopped.").

In *City of Sherrill*, the Oneida Indian Nation ("OIN") sued the local municipality to enjoin the imposition of property taxes on fee land owned by the tribe. The parcel was part of the tribe's aboriginal territory that had been sold 200 years prior in contravention of the Non-Intercourse Act, and recently reacquired by the tribe on the open market. *City of Sherrill*, 544 U.S. at 202. By that point 99 percent of the population was non-Indian. *Id.* at 211. The Court held that "[t]he wrongs of which OIN complains in this action occurred during the early years of the Republic, ... [and that] [i]t is well established that laches, a doctrine focused on one side's inaction

and the other's legitimate reliance, may bar long-dormant claims for equitable relief." *Id.* at 216-17.[5] The Court denied relief to the OIN on this basis. The Court also observed that Congress had adopted "a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being," thus providing an alternative avenue of relief. *Id.* at 220.

City of Sherrill did not address whether laches or other equitable defenses could be raised against the United States. Instead it looked to the doctrines of laches, acquiescence, and impossibility to resolve a dispute over taxing authority. Not only was there a 200 year passage of time, but the population and character of the land was transformed. In deciding *City of Sherrill*, the Court drew on a line of cases involving the application of equity to sovereign boundary disputes. *Id.* at 218 ("As between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territo-

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[5] *Amici* take the position that *City of Sherrill* was inconsistent with a large body of law that finds that the defense of laches has no application to land claims (which do not sound in equity) and to Indian land claims in particular, and that *City of Sherrill* inappropriately applies an ill-defined "disruption" standard that blindly prioritizes the interest of state governments over those of tribes. *See* Kathyrn Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009). It is not necessary, however, to revisit that issue here. As already noted, the United States was not even a party to *City of Sherrill*. Moreover, the decision itself is a thin reed for the State's invitation to alter the longstanding balance of power between the federal government and the states in federal court litigation.

ry."), citing *Ohio v. Kentucky*, 410 U.S. 641, 651 (1973), *Massachusetts v. New York*, 271 U.S. 65, 95 (1926), *California v. Nevada*, 447 U.S. 125, 131 (1980).

No such disputes are present here. The defendants in the cases briefed by the parties in *City of Sherrill* did not generalize beyond these border disputes. No decision addressed more generic federal statutes or regulations, such as those involving highway construction projects. Extrapolating *City of Sherrill* as a basis for finding waiver against the United States government is not supported anywhere in the record of the Court's decision or the record on which it was based.

The development of this doctrine in the lower courts since *City of Sherrill* is instructive. It appears no court has applied *City of Sherrill* to bar any claims other than those involving jurisdictional disputes over land. For example, the Tenth Circuit rejected a claim by the Town of Myton, Utah that "[b]ecause the Tribe waited so long to assert claims against it . . . the town has long since and fairly come to expect that it contains no tribal lands qualifying as Indian country." *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1263 (10th Cir. 2016)(Gorsuch, J.). Instead the court observed that the lands had reverted to the tribe in 1945, that the tribe had promptly filed suit when the local government first tried to assert jurisdiction, and that it had subsequently won two separate judgments regarding lands in Myton. *Id.*[6] *See also, Quapaw Tribe of*

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[6] Both the Tenth Circuit and the Central District of California have also held, after *City of Sherrill*, that laches cannot apply to

Oklahoma v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1192 (N.D. Okla. 2009) ("[I]n *Sherrill*, the OIN was attempting to displace local and state governments by asserting its own sovereign authority over land which it had not inhabited for almost 200 years. By contrast, the Tribe is asserting claims under Oklahoma law concerning an alleged public nuisance on tribal land."); *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. 05-10296-BC, 2008 WL 4808823, at *22–23 (E.D. Mich. Oct. 22, 2008) ("First, quite apparent is the fact that Defendants' incremental assumption of governmental responsibilities occurred sometime after the treaties in 1855 and 1864. Clearly, the challenged conduct is not the same sort of distinct ancient wrong arising from the early days of the Republic that was at issue in either *Sherrill* or *Cayuga*.").

The same considerations that underlie this Court's reluctance to apply equitable defenses to bar the United States are still relevant today. That a treaty may be old does not render its obligations less important. Neither the executive nor the states may alter or waive Indian treaty obligations. This Court has said, "Congress may abrogate Indian treaty

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lands actually held in trust by the United States. *Myton*, 835 F.3d at 1263. ("For one thing, the lands that reverted to the Tribe in 1945 are owned by the United States and held in trust for the benefit of the Tribe. And given this, it is far from clear whether the doctrine of laches could be used to determine the fate of this territory, for laches is a line of defense that usually may not be asserted against the United States."); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV13883JGBSPX, 2016 WL 2621301, at *3 (C.D. Cal. Feb. 23, 2016).

rights, but it must clearly express its intent to do so." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). If statutory language that "makes no mention of Indian treaty rights" will not be interpreted to abrogate those rights, then surely a Clean Water Act permit that "makes no mention of Indian treaty rights" cannot do so either. *Id.* at 203.

II. The affirmative defense of laches was never raised below and is not supported by findings of fact in the record.

Laches is an affirmative defense that must be pleaded and proven. "A defendant asserting the doctrine of laches must affirmatively establish: (1) knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by plaintiff in commencing an action; and (3) damage to defendant resulting from the delay in bringing the action." *Davidson v. State*, 802 P.2d 1374, 1381 (Wash. 1991).

The State raised defenses of waiver and estoppel, but it did not allege laches. Pet. App. 274a ("The affirmative defenses laid out in paragraphs 6.1 through 6.8 of Washington's answer are based on the doctrines of waiver or estoppel."). There was a seven-day bench trial, with extensive findings of fact by the district court, Pet. App. 128a, but the judge made no findings of fact that would allow an appellate court to rule in favor of the State on this ground. It was well within the State's power to plead an affirmative defense of laches and endeavor to prove it, but this was not done.

In contrast, the statement regarding rehearing *en banc* suggests that Respondents and the United

States waited more than 100 years to discover that barrier culverts are a violation of the Stevens Treaties: "Nonetheless, it apparently *just* occurred to the Tribes, the United States, and our court that in order to fulfill nineteenth century federal treaty obligations, the State of Washington must now be required to remove physical barriers which might impede the passage of salmon." Pet. App. 18a (emphasis in original). "Given the United States' involvement in designing the culverts and its long acquiescence in their existence, one might suppose that an equitable doctrine such as laches would bar suit by the United States." *Id.* at 33a.

The relevant findings of fact in the record below also do not support a defense of laches. Neither the stream blockages, nor the substantial degradation of the fishery that the blockages have caused, dates back to the time of the Stevens Treaties. It would have been the State's responsibility, as the party asserting laches, to prove when the "facts constituting a cause of action," *Davidson*, 802 P.2d at 1381, occurred, and it has not done so. There is no proof in the record that a cause of action for the United States and the Tribes happened sufficiently long ago for laches to become an issue.

The recent drops in the salmon harvest attest to the timeliness of the suit. According to the district court, "Salmon abundance has declined precipitously from treaty times, but particularly in the last few decades." Pet. App. 157a, ¶ 7. Harvests of salmon have declined dramatically since 1985," Pet. App. 175a, ¶ 8. "The Tribes are *at present* unable to harvest sufficient salmon to meet their needs and provide a livelihood for those tribal members who

desire to fish salmon for a living." *Id.* at 158a, ¶ 13 (emphasis added).

An additional consideration is the reality on the ground. The number of barrier culverts continues to grow faster than the State is repairing or replacing culverts, creating a continual stream of fresh violations. Between 2009 and 2011, the State completed 24 barrier culvert projects. *Id.* at 162a, ¶ 28. At this rate it would take a century to replace all the barrier culverts in the inventory. *Id.* at 163a. During the same period, the total number of barrier culverts increased from 1,158 to 1,236. *Id.* at 163a-64a, ¶ 29.

Allegations relating to culverts were raised at the very beginning of this case, in the 1970s, when the district court chose to bifurcate those issues and delay "phase II" discovery until after "phase I" was complete. Joint App. 800a; 802a. After discovery, the United States and Respondents moved for summary judgment, and specifically noted that the challenged blockages included barrier culverts. *Id.* 806a. Since the state highway system was completed in 1968, *id.* at 179a-180a, 398a, little time had passed. Furthermore, even the culverts on the oldest roads have often been subject to continuing violations: culverts wear out and are ordinarily replaced every 30 to 80 years and many state highways have been enlarged and widened. Joint App. 134a; 154a.

Finally, and despite what the State asserts here, there is nothing inherently unreasonable about requiring even aging culverts to be rebuilt so that fish may pass through and reproduce. The Supreme Judicial Court of Massachusetts considered the application of laches to an "ancient dam" that blocked the passage of fish in 1808 – and rejected it

as a defense against the government. *Inhabitants of Stoughton v. Baker*, 4 Mass. 522, 526 (1808). The court required the dam owners to reimburse the public for the cost of repairing the dam, finding that "every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish." *Id.* at 528. "This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it." *Id.* "For no laches can be imputed to the government, and against it no time runs so as to bar its rights." *Id.* The Stevens Treaties may be old but the rights they solemnly memorialized are perpetual and very much alive.

* * *

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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